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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

**FRANK E. GABLE,**

**Case No. 3:07-cv-00413-AC**

**Petitioner,**

**UNOPPOSED MOTION FOR  
RELEASE PENDING APPEAL**

**v.**

**MAX WILLIAMS,**

**Respondent.**

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Petitioner, Frank Gable, through his attorneys, respectfully moves the Court pursuant to Fed. R. App. P. 23(c) and *Hilton v. Braunskill*, 481 U.S. 770 (1987), for release pending the State's appeal of this Court's April 18, 2019, Opinion and Order and Judgment granting in part Mr. Gable's amended petition for writ of habeas corpus, CR 168, 169. This motion is supported by the accompanying memorandum of law. Assistant Attorney General Samuel Kubernick has indicated that the Respondent does not oppose this motion and agrees to Mr. Gable's release on conditions pending appeal. The parties are continuing to confer regarding the appropriate conditions. The memorandum of law address the legal analysis that supports release and discusses the issues that

currently remain outstanding and that would need to be resolved prior to the issuance of any order for release should the Court be inclined to grant this motion.

Respectfully submitted this 31st day of May, 2019.

/s/ Nell Brown

Nell Brown, Assistant Federal Public Defender

/s/ Mark Ahlemeyer

Mark Ahlemeyer, Assistant Federal Public Defender

Attorneys for Petitioner

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**Petitioner,**

**MEMORANDUM IN SUPPORT OF  
UNOPPOSED MOTION FOR  
RELEASE PENDING APPEAL**

**v.**

**MAX WILLIAMS,**

**Respondent.**

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**BACKGROUND**

Frank Gable, successful habeas petitioner, hereby moves for release pending the State's appeal of this Court's grant of relief. Federal Rule of Appellate Procedure 23 creates a "presumption of release from custody" in cases where a district court has granted relief to a habeas petitioner. *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987). On April 18, 2019, this Court conditionally granted a writ of habeas corpus, and ordered the State to release Mr. Gable or to initiate a new trial in the underlying Marion County criminal case within ninety days. CR 168, 169. Mr. Gable has served nearly thirty years in prison for a conviction that

is, at worst, the wrongful conviction of an innocent man, and, at best, the product of a trial rife with highly suspect evidence and marred by errors of a constitutional magnitude.

On May 15, 2019, the State filed a notice of appeal and moved to stay the Court's retrial order pending appeal. CR 170, 171. In order to conserve taxpayer and judicial resources, Mr. Gable does not oppose a stay of this Court's order requiring initiation of a new trial in Marion County within ninety days.

This memorandum supports Mr. Gable's motion for release pending appeal, which is evaluated under the factors set out in *Hilton*. While the State's stay motion opposed Mr. Gable's release pending appeal, the State has since revised its position. The State does not oppose Mr. Gable's request for release on certain conditions.

If released, Mr. Gable would serve a three-year term of supervised release in District of Oregon Case No. *United States v. Frank Edward Gable*, No. 91-170-PA. The parties and the United States Probation Office (USPO) have conferred regarding a release plan should the Court order release. It is expected that the Oregon Department of Corrections (ODOC) would release Mr. Gable directly from the prison where he is currently housed, and that the USPO would arrange for supervision in the federal District where Mr. Gable would reside.

Additionally, should the Court order release to the three-year period of federal supervision, there will be two hurdles to clear for Mr. Gable to actually be released to federal supervision. First, the ODOC would need to recompute Mr. Gable's sentence to reflect that none of the 29.5 years he has served in custody should be credited toward the now-vacated

judgment in the Marion County case. Apparently, ODOC is prepared to recompute the sentence if this Court orders the conviction vacated and Mr. Gable released.

Second, the federal Bureau of Prisons (BOP) would need to recompute Mr. Gable's federal sentence to apply time Mr. Gable has already served to the 105-month federal sentence in order for Mr. Gable to be released to supervision. It previously was anticipated that, for time served that has not been credited against a state sentence, the BOP would credit the time against the federal sentence. However, based on a conversation that representatives of the State had with a representative of the BOP recently, the State believes the BOP may not recompute Mr. Gable's sentence and apply the time he has served to the federal sentence until the appeal of this Court's decision is complete. If that is the case, and the DOC releases Mr. Gable, he would simply be moved to federal custody, which would not be preferable to Mr. Gable remaining in state custody during the appeal. He is already established in state custody and movement to federal custody, rather than release, would inflict additional hardship. Accordingly, undersigned counsel needs additional time to investigate and, hopefully, resolve this concern.

### **ARGUMENT**

As noted above, Fed. R. App. P. 23(c) creates a presumption of release from custody pending an appeal after a district court has granted a writ of habeas corpus. *O'Brien v. O'Laughlin*, 557 U.S. 1301, 1302 (2009); *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987) ("Rule 23(c) undoubtedly creates a presumption of release from custody in such cases."). The presumption can only be overcome if the State proves that "the traditional factors

regulating the issuance of a stay weigh in favor of granting a stay.” *O’Brien*, 557 U.S. at 1302. Those factors are: (1) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) Whether the applicant will be irreparably injured absent a stay; (3) Whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) Where the public interest lies. *Hilton*, 481 U.S. at 776. In addition, courts can consider the possibility of flight and any danger to the public. *Id.* at 777. Courts are also authorized to consider a “state’s interest in continuing custody and rehabilitation pending a final determination of the case on appeal,” and if the petitioner only has a short time left to serve, that interest is weak. *Id.* The petitioner’s interest in release is “always substantial,” but will be strongest where other the factors above are weak. *Id.* A court should consider these factors to see if they “tip the balance” against the presumption of release. *Id.* As the Supreme Court has held:

Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release. . . . Where the State’s showing on the merits falls below this level, the preference for release should control.

*Id.* at 778 (internal citations omitted). As noted above, Mr. Gable does not oppose staying any retrial until after the State’s appeal is resolved. This will conserve public funds and avoid unnecessary litigation.<sup>1</sup> However, Mr. Gable maintains that the State cannot

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<sup>1</sup> Counsel has already been appointed for Mr. Gable to prepare a defense in the Marion County Case. Additionally, the State, through the Oregon State Police, has been contacting the recanting witnesses in the past several weeks. Thus, some taxpayer expense will continue to accrue whether the matter is stayed or not by virtue of the fact that the State

overcome the presumption favoring release because it has not shown a substantial likelihood of success on appeal or a substantial case on the merits, much less that the other factors militate against release so as to overcome the presumption.

**I. The State Has Not Demonstrated A Substantial Likelihood Of Success On Appeal.**

The State has not made the required showing that it has a substantial likelihood of succeeding on appeal. This Court painstakingly reviewed the exhaustive briefing and voluminous evidence submitted by the parties in this case. This Court's findings and its ultimate decision granting relief are amply supported by the record. The Court's ninety-four page opinion explains in detail why it found reliable Mr. Gable's evidence of innocence, including the recantation evidence, the expert scientific evidence, and another man's confession to the crime.

The Ninth Circuit will give deferential review to these factual findings. While a District Court's decision to grant habeas corpus relief is reviewed *de novo*, credibility and factual findings are reviewed for clear error. *Leavitt v. Arave*, 383 F.3d 809, 815 (9th Cir. 2004) (citing *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002)). As the Ninth Circuit explained in *Crittenden v. Chappell*, the Federal Rules of Civil Procedure require clear error review of factual findings whether based on oral or other evidence. 804 F.3d 998, 1007 (9th Cir. 2015) (citing *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574 (1985)). The Ninth Circuit explained:

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continues to pursue a conviction in the Marion County case.

The rationale for deference “is not limited to the superiority of the trial judge’s position to make determinations of credibility,” but also reflects that “[d]uplication of the trial judge’s efforts . . . would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.” *Id.* at 574-75 . . . ; *see* Fed. R. Civ. P. 52(a)(6) advisory committee’s notes (1985 amendment) (explaining that permitting *de novo* review of findings based on documentary evidence would “tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority”).

*Id.* at 1006-07. Clear error review is “significantly deferential,” and the appellate court must accept “the district court’s factual findings absent a ‘definite and firm conviction that a mistake has been committed.’” *Leavitt*, 383 F.3d at 815 (internal quotation marks and citations omitted).

In its stay motion, the State reprises the same arguments raised in its previous filings. The State’s motion suggests that the Court did not consider a number of facts, but these issues have been exhaustively briefed and the State’s arguments already have been rejected—implicitly or explicitly—by this Court. The State’s arguments evidence a difference of opinion with the Court’s reasoning, but identify no flaw in the Court’s analysis.

For example, the State rehashes its argument that John Crouse’s confession was not reliable, but does nothing to undermine the contrary reasons set out in the Court’s Opinion. The State faults Petitioner and the Court for focusing on Crouse’s confession that he killed Michael Francke during a botched car burglary. In doing so, the State misapplies the law and ignores much of the factual record. Legally, the State continues to err by arguing that certain details of Crouse’s confession, which did not match the State’s view of the physical evidence, should prevent a finding that the confession was trustworthy. Both the Supreme



Court and the Ninth Circuit have rejected this narrow view of the *Chambers* standard. *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012) (third-party confession trustworthy despite being in contradiction to known facts of the murder); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (third-party guilt evidence cannot be excluded merely because the State's DNA evidence strongly points to the defendant's guilt). Factually, the State simply ignores that parts of Crouse's confession, such as his claim that he punched the victim in the face, were directly supported by the physical evidence and included information that likely was only known by the actual murderer.

In addition, the State fails to grapple with the reality that: (1) Crouse's description of an interrupted car burglary became the very theory of the crime the State ultimately adopted; (2) Crouse's confession related to that car burglary scenario was substantively different than statements he made before and after that confession (in which he minimized his role or blamed others), to the point that that confession was believed by investigators at the time and was polygraphed as true by the Federal Bureau of Investigation (FBI); (3) Crouse appeared to know facts about the scene of the crime, such as the state of the victim's vehicle, that were never made public; and (4) Crouse's description of events was largely consistent with the unbiased eyewitness report of custodian Wayne Hunsaker.

As the Court noted, Petitioner's presentation at the November 2016 hearing demonstrated that while Crouse's confession was consistent with Hunsaker's testimony, the purported eyewitness statements of Cappie Harden and Jodie Swearingen were not. Moreover, not only were Harden's and Swearingen's inculpatory statements about Gable

inconsistent with Hunsaker's report, they were flatly inconsistent with each other. For example, despite claiming to have been together while witnessing the murder, Harden and Swearingen were never able to provide consistent statements on obvious and easily-remembered facts such as: (1) how they arrived at the scene; (2) where they were located at the time of the murder; and (3) where they went after supposedly driving away from the scene. The State continues to ignore these facts in claiming that a jury would credit Harden's trial testimony and Swearingen's grand jury testimony despite their recantations. This Court correctly found otherwise.

The State also maintains, without acknowledgment, its troubling double-standard. Specifically, the State argues that Crouse's confession was contaminated by police tactics while ignoring the far greater pressure put on the numerous material witnesses. Police pressure clearly tainted the statements of the material witnesses. Indeed, Mr. Gable presented expert scientific evidence that the interrogation and polygraph procedures used to elicit inculpatory statements from those witnesses were highly likely to produce false testimony. The State has presented no evidence to the contrary. Furthermore, the recantations from those witnesses are consistent in explaining how their respective false testimony came to be. Those explanations are supported by the factual record, as Dr. Raskin explained and this Court found.<sup>2</sup> The State has offered no other explanation for the shifting

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<sup>2</sup> In its attempt to challenge the Court's finding with respect to the credibility of the recantations, the State errs by claiming that Randy Studer recanted "two decades after petitioner's trial," CR 171, at 27, when in fact Mr. Studer, like Jodie Swearingen, recanted prior to trial. Also, the State incorrectly asserts that this Court mistakenly referred to Mark Gesner as "a recanting witness" on page 59 of the Opinion (CR 171 at 24); instead, the

witness statements, other than to claim that witnesses initially lied because they feared being labeled as snitches. *See, e.g.*, CR 171, at 22. But as explained in earlier briefing, police reports show that witnesses were readily willing to “snitch” about Gable or others during their initial interviews, they merely denied having knowledge about Michael Francke’s murder. CR 114, at 4.

Instead of acknowledging that it is troubling, at a minimum, to base an aggravated murder conviction and a life-without-parole sentence on evidence that was highly suspect to begin with, and that has now been recanted, the State claims, in a footnote (CR 171, at 28 n.9), that this Court’s “Opinion places too much emphasis on the police interrogation/polygraph evidence.” Yet, the State had continued to refuse to take head on this compelling evidence that reveals problems with its evidence of guilt. In sum, the State raises no new points that have not already been addressed in prior briefing. The Court, after reviewing the entire record, made factual findings and legal conclusions that are unlikely to be reversed on appeal. On this basis alone, the State cannot overcome the presumption that Mr. Gable should be released.

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Court accurately noted that Gesner’s girlfriend told police prior to trial that Gesner admitted that he had lied to police by implicating Gable.

**II. Even If This Court Concludes That The State’s Appeal Presents A Substantial Case On The Merits, The Other Stay Factors Do Not Support Continued Incarceration.**

**A. The Public Interest Favors Release.**

The public interest favors Mr. Gable’s release pending the State’s appeal. The public has no interest in continuing to incarcerate a person whose convictions were the product of constitutional error much less an innocent man. To the contrary, the public has a strong interest in protecting constitutional rights, and ensuring that citizens are not “denied of [their] liberty without a trial that meets constitutional standards and observes [their] constitutional rights.” *Griffin v. Harrington*, 2013 WL 3873958, at \*5 (C.D. Cal. Jan 18, 2013) (collecting cases). Continued incarceration of Mr. Gable will merely undermine faith in the criminal justice system.

Moreover, the taxpayers have no interest in pursuing this appeal and prosecution given that Mr. Gable has already served nearly thirty years in prison—a sentence longer than the actual length of the typical murder sentence in Oregon. The purposes of punishment and rehabilitation have already been served in this case. There is no evidence that Mr. Gable, at age fifty-nine, currently poses any danger to the community.

Mr. Gable has resided in the same Midwestern state prison since 2014. In the words of his counselor, Unit Team Supervisor Joshua Elliott, Mr. Gable has been a “model inmate.” Mr. Elliott has twenty years of experience in corrections and has seen Mr. Gable daily when he is on shift. Mr. Elliott provided a screenshot of the “Inmate Disciplinary History” for Mr. Gable (who has legally changed his name), showing no disciplinary issues

at all, which is attached at Petitioner's Exhibit A, at 1. In fact, a review of Mr. Gable's available prison history during his incarceration for this offense reveals essentially no disciplinary issues during three decades in various prisons.

Mr. Gable also has been using his time in prison to better himself. While programming has not been available to him during most of his incarceration, he has voluntarily taken the courses that are available to him. These have included courses that apply cognitive behavioral therapy as well as mindfulness-based emotional intelligence (MBEI). Attached at Petitioner's Exhibit A, pages 2-7, are several recent certificates Mr. Gable has earned in courses such as:

Thinking for the Future – CBT [Cognitive Behavioral Therapy]

Stressful Life Events

PMI [Prison Mindfulness Institute's]: Path of Freedom curriculum

Houses of Healing: A Prisoner's Guide to Inner Power and Freedom

Anger Management

Aggression Replacement Therapy

Mr. Gable holds a prison job in the yard. He performs maintenance, such as mowing the lawn, and handles equipment. It is a position of trust. He is outside most of the time weather permitting. Because the prison prohibits inmates with life sentences from obtaining minimum-wage jobs, he has been unable to work one of those more coveted positions.

The State argues in its stay motion that Mr. Gable has few ties to Oregon. While this fact is irrelevant because Mr. Gable would be released to reside with his family in the

Midwestern state in which he is currently housed, it is also not surprising that Mr. Gable's ties to friends and family in Oregon have dwindled while the State of Oregon has incarcerated him outside of Oregon for nearly the past three decades.

Mr. Gable has been incarcerated since September 1989 when he voluntarily went to the Oregon State Police station in Coos Bay at the request of investigators to be polygraphed. He was then 30 years old. He is now 59. For much of the past three decades before moving to the Midwest, Mr. Gable was housed in either California, Florida, or Nevada pursuant to an Interstate Compact agreement, although he spent some time at the Oregon State Penitentiary during his post-conviction case. For decades, Mr. Gable was unable to have visits because the State of Oregon housed him in these remote prisons. Mr. Gable's mother died while he was in prison. His step-father, who was located in the Coos Bay area, died two and a half years ago. Other aunts and uncles and foster family members too have passed away while he has been incarcerated. It is beyond dispute that he has lost a lot while incarcerated.

Mr. Gable's strongest nexus of support is in the state where he currently is incarcerated. Should he be released to reside there, he will have a stable residence with his wife of several years. Mr. Gable's wife, who is employed and will be able to assist Mr. Gable in finding employment, and pledges her support for Mr. Gable. Having a stable residence, gainful employment, and a network of support are important to successful re-entry. Unlike other successful habeas petitioners, Mr. Gable will be on federal supervision, which will provide him with additional resources to assist in his transition back into the

community. Information regarding Mr. Gable's release plan and release residence has been provided to the USPO. A declaration of Mr. Gable's wife will be submitted under seal if the Court believes it will be helpful to the Court's determination.

Mr. Gable also will have the support of his wife's extended family, and his own remaining extended family. His sister and younger brother reside in the same area. Since he has been housed in the Midwest, Mr. Gable has been able to have regular in-person visits several weekends a month as well as daily phone calls with his wife. He has also been able to have visits with his sister as well as her husband and children. Accordingly, release there will provide support and continuity for Mr. Gable during his transition from incarceration to life in the community, all of which is in the public interest.

**B. The State Will Not Be Irreparably Harmed By Mr. Gable's Release.**

The State is required to show a probability of irreparable injury if the stay is not granted. *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012). While the State might be irreparably harmed absent a stay of the retrial order, that question is not at issue because Mr. Gable agrees to a stay of the retrial order. The relevant issue is whether the State has shown a probability of irreparable injury if Mr. Gable is released. It can show no such probability.

As the Court is aware, the brothers of the victim support Mr. Gable's release so their rights will be vindicated by Mr. Gable's release.

Further, release will be to federal supervision on conditions set by the federal court. Mr. Gable's Judgment in the federal case provides for three years of supervised release on

numerous conditions including, among other things, that he: not commit a crime, not illegally possess a controlled substance, participate in substance abuse and mental health treatment as directed, submit to probationer searches, and the standard conditions that he not leave the district of supervision without permission, report monthly, answer truthfully, work regularly, notify the Probation Office of a change in residence or employment, refrain from excessive use of alcohol, avoid places where illicit substances are sold, and not associate with persons engaged in criminal activity among other things. *United States v. Frank Edward Gable*, No. 91-170-PA, Docket No. 61, at 3, which is attached hereto as Petitioner's Exhibit B.<sup>3</sup>

The USPO can ably supervise Mr. Gable. The USPO will supervise Mr. Gable in the District in which he is currently incarcerated, where he will be able to reside with his wife and will have the support of extended family as discussed above. Mr. Gable has neither the means nor the intent to flee. He has no passport. He has never been outside the United States. In any event, per the conditions of his federal Judgment, the USPO would need to approve any travel outside of the District.

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<sup>3</sup> In its stay motion, the State described the conviction in this federal case as being for a violation of the Armed Career Criminal Act. The federal case was based on allegations that Mr. Gable's wife purchased a shotgun for Mr. Gable, which he later traded for drugs. While Mr. Gable was initially charged under the ACCA, he pled guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g), and, based on advice of counsel, agreed to the high-end of a Career Offender sentence under the United States Sentencing Guidelines, which resulted in the term of 105 months followed by 3 years of federal supervised release. Today, Mr. Gable would likely face a significantly shorter sentence if the case would even be prosecuted federally.



The State's right to appeal will not be hindered in any way by Mr. Gable's release. Should the State prevail on appeal, his whereabouts will be known by the USPO which has a process to secure his compliance with any directives of the Court. If the State were to re-try Mr. Gable, his presence at that trial likewise can be secured. This Court may, of course, fashion additional conditions to further ensure that Mr. Gable's release is in the public's best interest.<sup>4</sup> As noted above, the parties anticipate being able to agree to some of these additional conditions, but may remain in dispute and will need to be resolved by the Court.

**C. Mr. Gable Will Be Irreparably Harmed By Continued Incarceration.**

In September, Mr. Gable will have served thirty years in prison for a conviction that, per the Court's ruling, is the wrongful conviction of a probably innocent man. As the Court found, the trial itself was marred by constitutional errors. CR 168, at 58, 78 (finding two constitutional errors that warrant habeas corpus relief). Further, this Court stated, "upon careful review of the voluminous record in this case and considering all of the evidence, both old and new and with due regard for its reliability, the court concludes that Gable has made a colorable showing of actual innocence" such that "it is more likely than not that no reasonable juror would find Gable guilty in light of the totality of all of the evidence uncovered since [his trial], particularly the newly presented evidence of witness recantations." CR 168, at 58; *see also id.* at 68. This Court has ordered a new trial at which Mr. Gable must be presumed innocent.

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<sup>4</sup> *See, e.g., Newman v. Metrish*, 300 Fed. Appx 342, 343-44 (6th Cir. 2008) (describing conditions); *Newman v. Rednour*, 917 F. Supp. 2d 765, 792 (N.D. Ill. 2012) (describing conditions).

Continued incarceration while the State appeals will irreparably harm Mr. Gable—perpetuating the very harm that habeas corpus seeks to remedy. *See Ward v. Wolfenbarger*, 340 F. Supp. 2d 773, 778 (E.D. Mich. 2004) (holding that “petitioner would suffer irreparable harm each day that he would remain imprisoned in violation of the U.S. Constitution” and noting that “remedying such harm is the very essence of the writ of habeas corpus”); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) (“[A]ny additional amount of actual jail time has Sixth Amendment significance.”).

According to the Ninth Circuit’s website, a “typical” appeal in a civil case is likely to take one to two years (not including certiorari to the United States Supreme Court).<sup>5</sup> Because this case is more complex and the record more voluminous than the typical case, the appeal will certainly take more time than the average case.

If Mr. Gable remains incarcerated, he will serve additional time that he will never get back. This would perpetuate a travesty of justice that has already spanned three decades. If this Court’s decision is upheld and Mr. Gable is acquitted at a retrial, he will have lost the additional two or perhaps three years during which the appeal is pending in addition to the thirty years of freedom—half his life—already lost. Moreover, if Mr. Gable remains

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<sup>5</sup> *See* <https://www.ca9.uscourts.gov/content/faq.php> (explaining, for a civil appeal, that the appeal process takes approximately 12-20 months from the notice of appeal date or 9-12 months from completion of briefing.”). This does not include time for seeking certiorari to the United States Supreme Court. *See A Reporter’s Guide To Applications*, p. 16 (available at <https://www.supremecourt.gov/publicinfo/publicinfo.aspx>).

incarcerated during the appeal, he might overserve the sentence that could be imposed should he lose at a retrial if this Court's decision is upheld.<sup>6</sup>

As the Court is aware, Mr. Gable has been serving a sentence of life without the possibility of parole. Mr. Gable has challenged that sentence as illegal under the United States Constitution's *Ex Post Facto* Clause. In fact, Mr. Gable may be the only prisoner in Oregon for whom this illegal *ex post facto* sentence has not been corrected or who has not been permitted to decide at a resentencing whether to waive his constitutional protections.<sup>7</sup> While the State's interest in detention is arguably stronger in cases involving life sentences, where, as here, Mr. Gable has already served nearly thirty years in very harsh prison settings and proven himself to be a model inmate, the State has already executed extremely harsh punishment and had ample opportunity to rehabilitate him. The State's interest in continuing custody is, accordingly, weak.

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<sup>6</sup> Specifically, if he were to be convicted at a retrial, the maximum term that Mr. Gable could receive is a term of life with the possibility of parole after thirty years. He has been acquitted of the death penalty and will not waive his *Ex Post Facto* rights at any retrial to allow the trial court to instruct on life without the possibility of parole—a sentencing option that was not available in January 1989, at the time of the crime at issue.

<sup>7</sup> As the Oregon Supreme Court explained:

In *State v. Langley*, 318 Or. 28, 861 P.2d 1012 (1993), and *State v. Wille*, 317 Or. 487, 501-05, 858 P.2d 128 (1993), this court held that the amendment adding the sentencing option of “true life” to the aggravated murder penalty statute does not apply to defendants who committed their crimes before July 19, 1989, the effective date of the amendment. In this case, defendant murdered the victim on September 19, 1985.

*State v. Pinnell*, 319 Or. 438, 444, 877 P.2d 635, 638 (1994) (“Accordingly, the trial court erred in concluding that “true life” was a sentencing option applicable to defendant.”).

As noted earlier, however, the State has agreed to Mr. Gable's release on conditions. The parties are in ongoing discussions regarding what additional conditions beyond those called for by the federal Judgment, if any, are necessary. It is expected that the parties will reach an agreement on some additional conditions, but, if the Court is inclined to grant this motion, that the Court ultimately will need to decide whether the imposition of certain disputed conditions is necessary. Further, rather than imposing unnecessary conditions now in anticipation of possible future events, Mr. Gable requests that the Court reserve the opportunity to hold a hearing, on its own motion or on motion of any party, to consider whether to modify these conditions at any time, for example, should the Ninth Circuit remand for an evidentiary hearing, or should it appear that additional conditions are necessary or that fewer conditions will suffice.<sup>8</sup>

### CONCLUSION

For the foregoing reasons, Mr. Gable respectfully requests that, upon resolution of the BOP recomputation issue discussed above, this Court grant his motion for release, and enter an order VACATING Mr. Gable's convictions in Marion County Circuit Court Case No. 90-C-20442.

Respectfully submitted this 31st day of May, 2019.

/s/ Nell Brown

Nell Brown

/s/ Mark Ahlemeyer

Mark Ahlemeyer

Attorneys for Petitioner

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<sup>8</sup> *E.g., Newman v. Rednour*, 917 F. Supp. 2d 765, 792 (N.D. Ill. 2012).

5/16/2019

## Inmate Disciplinary History

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# **CERTIFICATE** **of** **Completion**

*This Certificate is Proudly Presented to*  
*Franke Different-cloud*

*For successfully completing*  
*Anger Management*

*With a passing score in our Educational Curriculum*

03-02-2019

Date



*Jim Hill*

President of JES



# **CERTIFICATE of Completion**

*This Certificate is Proudly Presented to*  
*Franke Different-cloud*

*For successfully completing*  
*ART - Aggression Replacement Therapy*

*With a passing score in our Educational Curriculum*

03-06-2019

Date



*Jim Hill*

President of JES

# **CERTIFICATE** **of** **Completion**

*This Certificate is Proudly Presented to*  
*Franke Different-cloud*

*For successfully completing*  
*Houses of Healing - A Prisoner's Guide to Inner Power and Freedom*  
*With a passing score in our Educational Curriculum*

*04-14-2019*

Date



*Jim Hill*

President of JES



# **CERTIFICATE** **of** **Completion**

*This Certificate is Proudly Presented to*  
*Franke Different-cloud*

*For successfully completing*  
*PMF: Path of Freedom*

*With a passing score in our Educational Curriculum*

03-20-2019

Date



*Jim Hill*

President of JES

# **CERTIFICATE** **of** **Completion**

*This Certificate is Proudly Presented to*  
*Franke Different-cloud*

*For successfully completing*  
*Stressful Life Events*

*With a passing score in our Educational Curriculum*

03-23-2019

Date



*Jim Hill*

President of JES



# **CERTIFICATE** **of** **Completion**

*This Certificate is Proudly Presented to*  
*Franke Different-cloud*

*For successfully completing*  
*Thinking for the Future - CBT*

*With a passing score in our Educational Curriculum*

05-06-2019

Date



*Jim Hill*

President of JES

Defendant: FRANK EDWARD GABLE

Judgment—Page 3 of 3

Case Number: CR 90-170-01-

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of \_\_\_\_\_  
three years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☒ The defendant shall not possess a firearm or destructive device.
- 1. The defendant shall participate in a substance abuse treatment program as directed by the probation officer which may include urinalysis testing to determine if the defendant has used drugs or alcohol.
- 2. The defendant will participate in a mental health treatment program approved by the probation officer.
- 3. The defendant shall submit to a search of his person, place of residence or vehicle at such reasonable times and in a reasonable manner as directed by the probation officer.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.